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347-713—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1187

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, AND HUGH MCINTOSH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 406 F. 2d 192. The opinion of the district court (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1969. The petition for a writ of certiorari was filed on March 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after a jury has returned verdicts of guilty, the court of appeals may issue a writ of man-

damus directing the entry of judgments of conviction by the trial judge who has announced his intention to dismiss the indictment on grounds on which he has neither statutory nor inherent power to rely.

STATEMENT

Earlier proceedings:

In April, 1960, petitioners, together with co-defendants Magnasco and LaFante, were indicted in the Eastern District of New York on charges of hijacking a truck transporting goods in interstate commerce and conspiring to do so. The first trial was held in May, 1961, and ended in a hung jury. In June, 1961, the second trial resulted in the conviction of all defendants. Magnasco was killed before sentencing, and the convictions of the others were reversed on appeal because of errors by the prosecutor and the trial judge. The third trial, held in May, 1963, ended in a mistrial as to petitioners Spero, Albanese and Persico and in a hung jury as to the other defendants. The fourth trial, which lasted from January to April, 1964, resulted in the conviction of all defendants, but in July, 1965, these convictions were reversed by the court of appeals because of error in the charge to the jury.

Pretrial hearing before Judge Weinstein:

In October, 1967, the defendants moved to dismiss the indictment alleging that their right to a speedy trial had been violated, that they would be subjected to double jeopardy, and that their right to due process would be violated by an oppressive retrial. After a hearing, Judge Weinstein entered an order on December 13, 1967, denying the motions. He determined that

only six months of the delay since the reversal of the convictions in July, 1965, was chargeable to the government; that the responsibility for the remainder of the delay was not assessable; that the defendants could have obtained an earlier trial had they sought one but that the defendants had not sought a speedy trial; and that "No suggestion is made that since July, 1965, any loss of witnesses or any change in available evidence has made the trial more difficult." Judge Weinstein concluded his order by stating that "If, on the retrial of the case, it should appear that there was such prejudice, the defendants may renew their motion" (Pet. App. C 2–3).

Judge Dooling's proposed order:

The fifth trial began on April 3, 1968, and concluded on May 9 with verdicts of guilty against the petitioners.[1] Numerous post-trial motions, including one to set aside the verdict and dismiss the indictment, were thereafter made and Judge Dooling reserved decision.

On October 11, 1968, Judge Dooling distributed to counsel a proposed memorandum and order dismissing the indictment but agreed to delay the filing of the order to permit the Government to suggest a form of order which would be appealable. Pet. App. A 1–A 16.

After noting that Judge Weinstein had found that there had been no showing of a loss of witnesses or change in available evidence since the reversal and remand, Judge Dooling made clear his intention not

[1] Defendant LaFante was acquitted at the direction of the court.

to limit his determination to the question left open to the trial judge by Judge Weinstein. Thus, Judge Dooling stated (Pet. App. A 3):

> * * * The Court [Judge Weinstein] appeared to condition the right to effective renewal of the motion on a showing of loss of witnesses or other available evidence after remand. The test that will be applied, however, will not be so limited; * * *

In his opinion, Judge Dooling considered at length each of the alleged trial errors referred to by petitioners and found that there was no error at trial that required the setting aside of the jury's verdict. He then stated (Pet. App. A 14):

> The final question, then, is whether even if the verdict may not be set aside on the basis of matters intrinsic to the trial and its immediate setting, the indictment must be dismissed in the light of the trial considered in its entirety on the grounds urged before Judge Weinstein and reserved by him for reconsideration at trial time. * * *

Judge Dooling found that "[t]he specific circumstances of disadvantage which defendants advance as related to delay are not impressive." *Ibid.* Yet, he stated that he would dismiss the indictment because "the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process." Pet. App. A 16.

The petition for a writ of a mandamus

When Judge Dooling distributed his proposed opinion and order to counsel on October 11, 1968, he

stated that he recognized that his opinion could properly be characterized as

> a decision of a sort that is sufficiently unsupported by directly relevant precedent and would seemingly be sufficiently out of keeping with the generality of decisions in this area, so that a single District Judge would be taking a great deal upon himself in rendering it. That it is the kind of decision that properly belongs, if not with the Congress * * * certainly with a Court that has more ample opportunity to hear arguments, consider the philosophical implications of, and render a useful and authoritative decision. [Tr. 4.] [2]

Recognizing that the question of the government's right to appeal was not free from doubt, Judge Dooling then adjourned the proceedings to allow the government time to suggest ways in which his final order might be framed so that appellate review of his decision could be had.

On December 2, 1968, before any final order was entered by Judge Dooling, the government filed a petition for a writ of mandamus in the court of appeals.[3] On January 21, 1969, the court of appeals issued the writ and directed Judge Dooling to enter judgments of conviction on the jury's verdict and to sentence the defendants.

In deciding to issue the writ of mandamus, the court of appeals noted that Judge Dooling, despite

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[2] Tr. refers to the transcript of the proceedings on October 11, 1968.

[3] Judge Dooling had recognized that the government might wish to consider the possibility of mandamus (Tr. 14).

having found no prejudice at trial which would have warranted his setting aside the verdict, had in effect undertaken to re-examine the arguments already rejected by Judge Weinstein in his pre-trial ruling. The court of appeals then carefully examined Judge Dooling's proposed action and found that "It is apparent from the court's memorandum that the proposed dismissal is not based on the powers conferred on the district courts by the Federal Rules of Criminal Procedure" (Pet. App. B 7). The court of appeals also noted that, even if it is assumed that the district court has inherent power to do justice, outside that conferred by the Rules, the district judge's findings did not justify the exercise of such power in this case (Pet. App. B 9).

The court of appeals concluded that what Judge Dooling intended to do was simply to grant the motion to dismiss the indictments on the basis of the grounds which had been submitted to Judge Weinstein and rejected by him. It found that, although Judge Dooling had the power to take any appropriate action to protect the rights of defendants during trial, the availability of appellate review "eliminates any need for the existence of a power in the trial court to dismiss an indictment, after the return of guilty verdicts, on grounds rejected before trial" (Pet. App. B 11). Recognizing that the purpose of Rule 12(b) "is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution" (Pet. App. B 10), the court of appeals determined that Judge Dooling could not reverse

Judge Weinstein's determination of the motion to dismiss "without doing violence to the interests of judicial economy furthered by Rule 12(b) (2) and (4)" (Pet. App. B 11). The court concluded that, regardless of whether the government would have a right to appeal from Judge Dooling's action, considerations of the sound administration of criminal justice made it appropriate for the court to issue the writ of mandamus. Thus, the court stated (Pet. App. B 13):

> * * * Since we believe that the dismissal of an indictment after a verdict of guilty, upon grounds examined and found deficient before trial, is highly deleterious to the sound administration of criminal justice, it is important that we make clear and unequivocal response to the first example of such a dismissal to come before us. * * *

ARGUMENT

While Judge Dooling's decision to order the dismissal of the indictments in this case was clearly unprecedented, the instant petition presents only the narrow question whether it was appropriate for the court of appeals to issue the writ of mandamus to prevent Judge Dooling from granting the motion to dismiss on grounds rejected prior to trial by Judge Weinstein. In deciding to issue the writ, the court of appeals took care to point out that (Pet. App. B 11):

> "upon appeals from convictions this court will review the propriety of Judge Weinstein's original ruling, Judge Dooling's ruling that events at the trial did not demonstrate that the de-

> fendants had been seriously prejudiced by the delays before trial, and any other rulings which denied properly preserved objections to the conduct of the trial itself. * * *

In light of the fact that the merits of petitioners' underlying claims will be considered on a future appeal after the judgments of conviction are entered, there is no occasion for this Court to intervene at this stage of the proceedings to consider those issues. Moreover, the question of the power of the court of appeals to issue a writ of mandamus in circumstances such as this is not one that is likely to recur frequently.

1. In any event, the court of appeals correctly determined that a district judge may not assume what is, in essence, an appellate function by setting aside a conviction on grounds which were specifically rejected by another judge. We submit that Judge Dooling's proposed action was not authorized by the Federal Rules of Criminal Procedure and that an examination of the history of the Rules establishes that the drafters did not intend to grant the district judges an "inherent power" to dismiss actions on grounds other than those provided for in the Rules.

The only argument which petitioners make in attempting to demonstrate that the proposed order was premised on power conferred by the Federal Rules of Criminal Procedure is that Judge Dooling

intended to act under Rule 48(b).[3] But Judge Dooling did not, although he had every opportunity to do so, found his order on Rule 48(b).[4] Moreover, it is clear that Judge Dooling's action was not based on any determination by him that events at the trial had established that petitioners had been prejudiced by the delay in the prosecution. Indeed, he specifically rejected such contentions, stating: "The specific circumstances of disadvantage which defendants advance as related to delay are not impressive" (Pet. App. A 14). Petitioners' claims of prejudice other than those which might have appeared at the fifth trial had been rejected by Judge Weinstein and, as the court of appeals noted, Judge Dooling could not act under Rule 48(b) on the basis of those claims "without doing violence to the interests of judicial economy furthered by Rule 12(b) (2) and (4)" (Pet. App. B 11).

The history of the drafting of the Rules of Criminal Procedure clearly shows that the power of the trial judge to take action *after a verdict of guilty* was intended to be severely restricted and that, in particu-

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[3] As the court of appeals noted (Pet. App. B 8), it is clear from Judge Dooling's opinion that he was not proposing to act either under Rule 29 or Rule 33, and petitioners do not suggest that either of these Rules provides a basis for his action.

[4] Although petitioners point to the citation of two cases under that rule, they neglect to point out that those citations follow two cases which involve reversal under the due process provisions of the Fifth Amendment on the basis of prejudice shown at trial.

lar, the power to dismiss the indictment after verdict was to be limited to that specifically provided in the Rules. The development of present Rule 48(b) makes that clear. Rule 44 of the preliminary draft, dated 1943, contained only the equivalent of what is now Rule 48(a), permitting the filing of dismissals by the government. The notes to the proposed rule stated:

> The rule does not affect the power of the district court to dismiss a proceeding for want of prosecution. See *Ex parte Altman,* 34 F. Supp. 106 (S.D. Cal., 1940). As to other circumstances in which the rules contemplate the possibility of dismissal by the court, see Rule 7(b)(2) (The Grand Jury—Objections to Grand Jury or to Grand Jurors: Motion to Dismiss), Rule 13 (Pleadings and Motions; Defenses and Objections), Rule 14 (Relief from Prejudicial Joinder).

Federal Rules of Criminal Procedure, Preliminary Draft with Notes and Form (1943), p. 192, contained in *Federal Rules of Criminal Procedure—Documentary History (1943–1945)*, Advisory Committee on Rules of Criminal Procedure, Part I. See also, Second Preliminary Draft, Rule 50, *ibid.,* Part II, p. 180. This inherent power to dismiss for want of prosecution was thereafter formalized by the inclusion of Rule 48(b) in the final draft adopted by this Court. See Notes to the Rules of Criminal Procedure for the District Courts of the United States, *ibid.,* Part VII, p. 41.

It is important to note that the Advisory Committee mentioned an inherent power to dismiss only in case of want of prosecution and that, in the end, the drafters were unwilling to leave open to construction the

existence of inherent power in such an important area but determined that it should be included in the letter of the rule. That the drafters did not intend to grant the district courts any "inherent power" to dismiss an indictment on grounds other than those specified by the Rules becomes even more apparent when it is recognized that, in the drafting of other rules, the Committee was careful to note those instances where the Court would have inherent power to take action not specifically covered by the Rules. See the Notes to Rule 29(b), Rules 35 and Rule 57(b) (*ibid.*, Part VII, p. 29; Part II, p. 131; Part VII, pp. 55–56). Thus, it is evident that when the Committee did not mention the existence of any power to dismiss an indictment after trial beyond that conferred by the Rules their failure to comment was not inadvertent but rather reflected their determination that no such power did or should exist.

3. Since the court of appeals correctly determined that Judge Dooling had no proper basis for refusing to enter a judgment of conviction on the jury's verdict, the writ of mandamus was appropriate to compel him to perform this duty. *Ex parte United States*, 287 U.S. 241; *Ex parte United States*, 242 U.S. 27; see *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. As this Court recognized in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, an appellate court may properly issue a writ of mandamus "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." See also *Will* v. *United States*,

389 U.S. 90, 97–98; *Fong Foo* v. *United States*, 369 U.S. 141.

This Court's decision in *Will* v. *United States, supra*, does not support petitioner's contention that mandamus is not available to the government here. In *Will*, which involved an application for mandamus to review the district court's ruling on a pretrial discovery motion, this Court found strong reasons against mandamus in the policy of not allowing interlocutory appeals in criminal cases. See 390 U.S. 96–98. Here, however, the trial has ended with a verdict of guilty and the government seeks merely to compel the trial judge to enter the judgment of conviction on that verdict. In *Will* this Court recognized that mandamus is proper "where the Court overreached its judicial power to deny the government the rightful fruits of a valid conviction." 389 U.S. at 97–98.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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